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No. 01-___

IN THE

Supreme Court of the United States

JAN SCHLICHTMANN,

Petitioner,

v.

CADLE COMPANY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When an attorney has sought bankruptcy protection and received a discharge, does the "fresh start" principle of bankruptcy under *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934), reserve to the emancipated-debtor attorney the fees that he earns through post-petition legal work for a client on a contingency-fee matter (as many courts, including other federal appellate courts, have held)—or do those fees belong to a creditor that had a pre-petition security interest in the attorney's accounts receivable (as the First Circuit held in this case)?

2. Is the answer to the foregoing question changed if the amount of the potential contingent fee was set, and the potential recovery from which the contingent fee might be paid was in escrow, prior to the attorney's bankruptcy, where the award of fees was still subject to the contingency that the attorney achieve a favorable result for his client through post-petition legal work?

LIST OF PARTIES

In addition to Petitioner Jan Schlichtmann (defendant below) and Respondent Cadle Company (plaintiff below), there were formerly other parties to this case, all defendants below. However, all of those defendants were dismissed in the trial court (all but one were voluntarily dismissed, and the remaining one, Thomas Kiley, was dismissed by an unappealed ruling in his favor), leaving Schlichtmann and Cadle Company as the only parties to this case in the Court of Appeals (whose judgment is sought to be reviewed) and in this Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jan Schlichtmann respectfully prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the First Circuit, *Cadle Company v. Schlichtmann*, 267 F.3d 14 (1st Cir. 2001) rehearing denied (1st Cir. Nov. 21, 2001).

OPINIONS BELOW

The October 4, 2001, opinion of the United States Court of Appeals for the First Circuit, reported at 267 F.3d 14, is reproduced in Appendix A [1a-11a]. An earlier, now withdrawn, version of the opinion is unofficially reported at 2001 U.S. App. LEXIS 16715 (1st Cir. 2001). The November 21, 2001, order of the Court of Appeals denying rehearing and rehearing en banc, which is thus far unreported, is reproduced in Appendix C [16a]. An opinion of the United

States District Court for the District of Massachusetts denying motions for summary judgment is reproduced in Appendix B [12a-15a] and is unofficially reported at 1999 U.S. Dist. LEXIS 22768.

JURISDICTION

The opinion of the United States Court of Appeals for the First Circuit was issued on October 4, 2001. Petitioner Schlichtmann timely sought panel rehearing and rehearing en banc, and that request was denied on November 21, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

11 U.S.C. § 541(a)(6) provides:

> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is composed of all the following property, wherever located and by whomever held: . . .
>
> (6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

11 U.S.C. § 552 provides in pertinent part:

> (a) Except as provided in subsection (b) of this section, property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case.
>
> (b)(1) Except as provided in sections 363, 506(c), 522, 544, 545, 547, and 548 of this title, if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property

of the debtor acquired before the commencement of the case and to proceeds, product, offspring, or profits of such property, then such security interest extends to such proceeds, product, offspring, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable nonbankruptcy law, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.

STATEMENT OF THE CASE

This case presents the question whether an attorney who has received a discharge in bankruptcy, and who thereafter through substantial post-bankruptcy effort successfully concludes a legal matter under a contingency fee contract, is entitled to retain the fee attributable to that post-petition work. Many courts, including the United States Courts of Appeals for the Fifth, Seventh, and Ninth Circuits, have recognized that the emancipated-debtor attorney is entitled to the fee arising from that post-petition work; the judgment in this case departs from that settled understanding on this fundamental and recurring question of federal bankruptcy law. Although the court below offered various reasons for departing from that settled understanding in this case, those reasons in themselves present important questions that deserve this Court's review, largely because those reasons conflict with the decisions of other courts including this Court. In the end, this case presents the question of whether a "fresh start" is still the cornerstone of bankruptcy, or whether the "fresh start" is subject to novel case-by-case exceptions such as the one that the court below created here.

Respondent Cadle Company ("Cadle") purchased the assets of a failed lending institution, including a security interest in the accounts receivable of a lawfirm ("the lawfirm"). Cadle later sued various individuals and entities, claiming that (pursuant to the security interest that it had

purchased) it was entitled to the entire attorneys' fee distribution in an environmental case that had been litigated, and settled, in Massachusetts state court ("the Groton matter"). Among the defendants was Petitioner Jan Schlichtmann; he is the only remaining defendant at this point. The asserted basis for federal jurisdiction was diversity, under 28 U.S.C. § 1332. [2a-3a]

Petitioner Schlichtmann—who is, it may be noted as a matter of cultural interest, the attorney profiled in Jonathan Harr's bestselling book "A Civil Action"—was a partner in a lawfirm that represented the plaintiffs in the Groton matter beginning in 1986. The case was taken on a contingent fee basis. [2a]

In 1991 Schlichtmann personally filed a bankruptcy petition, which as a matter of law caused the dissolution of the lawfirm. [2a]. He was discharged from bankruptcy on January 28, 1992. Schlichtmann continued to work on the Groton matter after his bankruptcy filing and his bankruptcy discharge, through the final resolution of the Groton matter some years later in 1995. It is undisputed that Schlichtmann devoted substantial time and effort to the Groton matter after his bankruptcy filing. [14a]. A state court approved settlement had been reached in the Groton matter in 1991, prior to Schlichtmann's bankruptcy filing, and some funds were disbursed (to the plaintiffs in the Groton matter, and to the lawfirm) at that time. [2a]. Those funds that were distributed in 1991 are not the subject of this current battle between Cadle and Schlichtmann. Instead, the present battle has to do with a second distribution of settlement funds, which was made in June, 1995. Those second-phase funds had been escrowed in 1991 pursuant to the terms of the June, 1991 settlement, to be payable (to the Groton plaintiffs and as attorneys' fees, in court-approved proportions) *only if certain future contingencies were met, contingencies that would be met (if at all) largely through future efforts of counsel for the*

Groton plaintiffs, most particularly obtaining approval by the Massachusetts Department of Environmental Protection of an on-site remediation plan, upon which the defendants and the plaintiffs had agreed. [13a]. As it turned out, most of the significant amount of work performed on behalf of plaintiffs, to help achieve the contingencies that would bring the second phase of the settlement distribution to fruition (and thus result in the disbursement of the escrowed funds), was performed not by the lawfirm—for the lawfirm no longer existed—but by Schlichtmann personally. And the lion's share of that work was performed by Schlichtmann "post-petition"—i.e., after his bankruptcy filing. [13a-14a].

Upon the final completion of the Groton litigation in such a way as to trigger the plaintiffs' contingent right to the escrowed second-phase funds, those funds were distributed to the Groton plaintiffs and to Schlichtmann. Schlichtmann received the $300,000 in attorneys' fees for this second-phase distribution.[1]

Cadle filed the present suit in June, 1995, claiming that Schlichtmann had "converted" that $300,000. On July 19, 1999, the District Court denied cross-motions for summary judgment filed by Schlichtmann and Cadle. The District Court, in denying summary judgment, indicated that Cadle could win some of the money in question (though perhaps not all of it) upon a showing that the fraction of the fees retained by Schlichtmann was excessive when compared to the fraction of the work that he personally put into the matter after his bankruptcy. [14a-15a]. However, Cadle did not pursue this line of proof at trial, leading the District Court to note correctly at trial that "the apportionment theory is dead in this case." Instead, Cadle insisted it was entitled to *all* of

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[1] Of the $300,000, $100,000 was distributed by Schlichtmann to his former partners for the firm's pre-dissolution work, and $200,000 was retained by Schlichtmann for his post-petition services, of which a portion was shared with another attorney. [14a].

the money. The case proceeded to trial on this theory and on December 16, 1999 a verdict was rendered in favor of Schlichtmann.

Cadle appealed, and the United States Court of Appeals for the First Circuit reversed. *Cadle v. Schlichtmann*, 267 F.3d 14 (1st Cir. 2001). The Court of Appeals held that Cadle was entitled to that portion of the Groton fee that had been retained by Schlichtmann after he received notice of Cadle's claim to the fee distribution, and remanded to the District Court to determine the amount and to enter judgment against Schlichtmann in that amount on Cadle's "conversion" claim.[2] The Court of Appeals rejected Schlichtmann's contention that, by virtue of his bankruptcy filing and the "fresh start" principle of bankruptcy, he was entitled to retain the earnings attributable to his post-petition work on the Groton matter. 267 F.3d at 19-21 [7a-10a]. The reasoning of the Court of Appeals, and an explanation of why that reasoning raises important questions that deserve this Court's review, are discussed more fully below.

REASONS FOR GRANTING THE PETITION

The procedural posture of the present case offers no justification for a departure from ordinary governing rules of federal bankruptcy law. Although this case arises on appeal from a diversity suit seeking to enforce a security agreement, and not from a bankruptcy court decision, still Schlichtmann

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[2] The matter was subsequently remanded to the District Court and the parties are presently awaiting word from the District Court as to how the matter is to proceed. Schlichtmann on February 11, 2002 filed a motion in U.S. Bankruptcy Court for the District of Massachusetts in his case 91-18387-CJK seeking to reopen his case for the purpose of holding Cadle in contempt and to enjoin Cadle from further prosecution of its diversity case in District Court on the grounds that Cadle's action and related conduct violates the Discharge Order and Injunction entered by the Bankruptcy Court January 28, 1992.

properly raised the bankruptcy issues as a defense to Cadle's claim against him. This Court may consider, and has considered, bankruptcy questions in this sort of procedural context. *See, e.g., Kreitlein v. Ferger*, 238 U.S. 21 (1915) (bankruptcy discharge was properly raised as a defense to state-law debt-collection efforts). Therefore, the questions involved herein are questions of federal law.

Likewise, it is useful to reemphasize the core factual matters. It is undisputed that the potential second-phase recovery to the Groton plaintiffs, and the potential fees from that recovery, were contingent—that they were not certain, that they depended on certain contingencies being successfully met, and that further legal work by plaintiffs' counsel was contemplated and necessary to trigger the plaintiffs' right to that second-phase recovery. And it is undisputed that Schlichtmann put in a significant amount of work on the matter *after* his bankruptcy petition, in order to bring about the success that would trigger his clients' second-phase recovery. The Court of Appeals did not suggest otherwise. It also bears emphasizing that there is absolutely no suggestion that the escrow of the second-phase funds was in any sense, or to any degree, a device to disadvantage creditors, or that it was undertaken with any anticipation of the bankruptcy of anyone involved; to the contrary, that escrow was a facet of an admirable and successful settlement that involved the parties' joint effort to resolve an environmental problem. In short, it is undisputed that the fees at issue here were, in every sense, earned by Schlichtmann's post-petition legal work on behalf of his clients. Yet the Court of Appeals held that those fees, earned by Schlichtmann's post-bankruptcy work, did not belong to Schlichtmann.[3]

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[3] As noted above, at one point in this litigation Cadle was advancing the theory that Schlichtmann kept more of the fees than were fairly

1. The Decision Below Creates A Split In Authority As To Whether An Attorney's Contingency-Fee Earnings From Post-Petition Legal Work Belong To The Attorney As An Emancipated Debtor Under The "Fresh Start" Bankruptcy Principle Of *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934).

The first and most basic reason for granting the Petition is that the judgment below marks a stark departure from the "fresh start" principle in bankruptcy, not only in the general outlines of that principle but also in the principle's particular application to debtors who are attorneys representing clients under contingency-fee arrangements. In exchange for turning over his property to creditors, the "fresh start" principle provides that the debtor starts anew unencumbered by pre-existing debts. From that point forward, the debtor's earnings are fully his own and are not subject to pre-bankruptcy debts. The "fresh start" principle is at the very core of bankruptcy law and policy. It gives the debtor a new opportunity in life and a clear field to earn from future effort, *Local Loan Co. v. Hunt*, 292 U.S. 234, 244-45 (1934) [4]; *Grogan v. Garner*, 498 U.S. 279, 286 (1991) ("a central purpose" of bankruptcy

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attributable to his post-petition work. But, as noted above, Cadle chose not to pursue that theory at trial, leading the District Court to correctly note that the "apportionment theory" was "dead." Thus, again, there is no longer any occasion in this case for fine factual analysis as to whether Schlichtmann kept the "right" amount for himself; instead, this case is about Cadle's assertion that it is entitled to *all* the fees.

[4] This Court has, through the decades, repeatedly followed *Local Loan* in this regard. *See, e.g.*, *Kokoszka v. Belford*, 417 U.S. 642 (1974); *Lines v. Frederick*, 400 U.S. 18 (1970); *Segal v. Rochelle*, 382 U.S. 375 (1966). In those cases, this Court has been called upon to resolve splits in authority as to whether a given sort of property, acquired by the debtor after his or her bankruptcy filing, comes within the "fresh start" rule—that is, whether the property belongs to the debtor as he or she begins economic life anew, or to the creditors seeking to satisfy their pre-petition claims. This case presents this Court with another such question.

jurisprudence is to provide the "opportunity for a completely unencumbered new beginning to the 'honest but unfortunate debtor'"). Many courts have recognized that an attorney's contingent fee comes within the "fresh start" rule to the extent that the fee is earned by post-petition work. Thus, for instance, the United States Court of Appeals for the Fifth Circuit in *Turner v. Avery*, 947 F.2d 772, 774 (5th Cir. 1991), held that the bankruptcy estate of a debtor attorney was entitled *only* to that portion of a contingency-fee recovery that was earned by the attorney's services prior to his bankruptcy filing; the remainder, the amount earned by post-petition legal services, belonged not to the estate but to the debtor. The Ninth Circuit followed *Turner v. Avery* in *In re Jess*, 169 F.3d 1204 (9th Cir. 1999), agreeing that contingency-fee awards are to be apportioned between that portion attributable to pre-petition services (which go to the estate, and thus to creditors) and that attributable to post-petition services (which remain with the debtor attorney). *Id.* at 1208. The United States Court of Appeals for the Seventh Circuit also recently agreed, in characteristically straightforward language: "the fair value of the services rendered by a contingent-fee lawyer up to the date of his bankruptcy (though not after, by virtue of section 541(a)(6)) is property of his estate in bankruptcy." *In re Carlson*, 263 F.3d 748, 750 (7th Cir. 2001) (Posner, J.), *citing Turner v. Avery* and *Jess*. The decision of the First Circuit in this case thus creates a stark conflict on this important and recurring question of federal law.[5]

We respectfully submit that the decision of the Court of Appeals is clearly wrong, and that the chorus of other courts is clearly correct. Contingency-fee earnings received after the attorney's bankruptcy filing—at least, that portion fairly attributable to work performed by the attorney post-

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[5] Other courts have also agreed with *Turner*, *Jess*, and *Carlson*. *See, e.g.*, *In re Allen*, 217 B.R. 952, 955 (Bankr. M.D. Fla. 1998).

petition [6]—are clearly analogous to the post-petition earnings that are classically and indisputably sheltered by the "fresh start" principle.

2. The Reasons That The Court Of Appeals Gave For Awarding The Fees For Post-Petition Work To The Creditor, Rather Than Reserving Them To The Emancipated-Debtor Attorney Under The "Fresh Start" Principle, Do Not Dissipate The Conflict Among Authorities On This Point, Nor Do They Make The Conflict Less Important.

Against the backdrop of this large and central Question Presented, the opinion of the Court of Appeals includes various suggestions as to that court's rationale for departing from the "fresh start" principle as it has been applied by other courts. But those rationales, in themselves, underscore rather than detract from the importance of review by this Court.

The Court of Appeals may (it is not clear) have based its ruling on the fact that the potential recovery under the second phase of the Groton matter was already in escrow, and that the amount of the contingent fee that might be payable from those funds was fixed, prior to Schlichtmann's bankruptcy filing. 267 F.3d at 19 [7a-8a]. If this was the basis for the court's ruling, then this in itself presents an important sub-question that merits this Court's review: Does property received by a debtor post-petition belong to the estate and/or creditors, rather than to the debtor embarking on his or her "fresh start", because the amount of that property was fixed

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[6] As seen above, other courts have held that the estate and creditors are entitled to that portion of a contingency fee that is fairly attributable to the debtor attorney's pre-petition work. We not do quarrel with that view in this case. At stake here, instead, is whether the creditors are entitled to the *entire* fee, even that portion that is fairly attributable to the debtor attorney's *post-petition* work.

and the property was in escrow prior to bankruptcy, even though the debtor earned that property only *after* bankruptcy through *post-petition* efforts?

The fact that the *amount* of the earnings to be derived from post-petition work was fixed in advance of the bankruptcy does not alter the debtor's legal entitlement to keep those earnings upon his "fresh start". Many, indeed by far *most*, debtors (at least, those who are employed and are earning income) enter into bankruptcy with their terms of future compensation fixed. This is true of debtors who have jobs where their salary is "x" or their hourly wage is "y". It is likewise true of contractors who have made but have not performed a contract at the time of bankruptcy. Thus, to the extent that it can be said that the amount of Schlichtmann's post-petition earnings was fixed in advance, the same can be said of most gainfully-employed debtors. Indeed, it can be said with even more accuracy as to most debtors than as to Schlichtmann, because his future earnings were by no means certain when he entered bankruptcy; though the amount of fees he would get *if successful* was fixed, it was unknown *whether he would be successful enough to earn those fees*. If fixing a dollar amount for contingent work, in advance, is sufficient to bring those fees outside the "fresh start" rule, then the same is true for most other earnings of most other debtors. This would mean spoiled starts instead of fresh starts, and would mean that *Local Loan* is a dead letter.

As to the fact that the Groton plaintiffs' potential second-phase recovery (including the attorney's fee portion) was in escrow, this too cannot possibly make the difference. The very nature of an escrow, of course, is that the funds have not yet become the property of the potential grantee of those funds; the funds, instead, are still in someone else's control and will "come out of escrow" and into the hands of the grantee only if certain events happen. In this case, the event that had to happen in order to trigger the right to those

escrowed funds was the achieving of certain defined legal success, through subsequent legal work. As noted above, that subsequent legal work involved obtaining regulatory approval for a plan that served the needs of all parties; that work had to be performed, and had to be successful in this mutual endeavor, in order for the plaintiffs and their counsel to receive the escrowed funds. Thus, the escrowed funds did not belong to the Groton plaintiffs, and the fees that would come out of those funds if they were disbursed did not belong to the law firm or to Schlichtmann. The escrow did not change the fact that, when Schlichtmann finally did receive the fees after more years of work post-bankruptcy, those fees were post-bankruptcy earnings through post-bankruptcy effort. Where the money was, before Schlichtmann earned a right to part of it—whether it was in a Groton defendant's own bank account, under a mattress, in escrow, or what have you—does not determine whether the money was post-petition earnings for Schlichtmann.

The Court of Appeals also relied on the fact that Schlichtmann, in granting the security interest on behalf of the lawfirm, had made an unconditional "commitment" that the escrowed potential fees would belong to Cadle's predecessor, that he had not mentioned to Cadle's predecessor that the receipt of those funds from escrow was contingent on success through future legal work, and "There is no reason why Schlichtmann should be able to back away from his own commitment." 267 F.3d at 21 [10a]. This pronouncement, however, brings us right back to where we started: crashing headlong into the "fresh start" principle. No doubt, from the perspective of a creditor, there appears to be no reason why the debtor should be relieved from his pre-bankruptcy commitment to pay money to the creditor. It *always* seems that way to the creditor. The same could be said, with equal moral indignation, about *every* debt of *every* debtor in *every* case: "He (she, or it) made a commitment,

and there is no reason why he (she, or it) should be able to back away from it!" But the core principle of bankruptcy, as discussed by this Court in *Local Loan* and cases following, is that there *is* such a reason. It is the "fresh start" principle, the rule that post-petition earnings belong to the emancipated debtor. Under the "fresh start" principle, the honest but unfortunate debtor such as Schlichtmann is to embark upon a "completely unencumbered new beginning." *Grogan v. Garner*, 498 U.S. 279, 287 (1991). As this Court recognized in *Local Loan*, this rule serves important public interests as well as each debtor's private interests. By purporting to make a new exception to that rule in this case—even if the exception was perhaps subjectively intended for this case alone on its facts—the Court of Appeals jeopardized the determinacy and stability of the rule itself, and thus jeopardized the important public interests that the rule serves.

Finally, the Court of Appeals indicated, more particularly, that its decision in this case was dictated by the statutory language of 11 U.S.C. § 552(b)(1). 267 F.3d at 20 [8a-9a] (discussing section 552(b)(1)). While Section 552(a) generally provides that pre-petition security interests (such as Cadle's) cannot reach property acquired by the debtor post-petition (such as the fees at issue here), Section 552(b)(1) creates an exception. Section 552(b)(1) allows a secured creditor to reach (*inter alia*) the "proceeds" of property in which it holds a pre-petition security interest, and the Court of Appeals here held that the post-petition contingency fees, earned by Schlichtmann's post-petition work, were the "proceeds" of the pre-petition contingency fee agreement in which Cadle had a security interest. 267 F.3d at 20 [9a].[7]

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[7] The success of the lower court's reading of section 552(b)(1) also depends, in this case, on conflating Schlichtmann with the lawfirm. That is, section 552(b)(1) allows a creditor to reach property acquired by the debtor post-petition only if that property was the proceeds (or profits, etc.) of "property *of the debtor* acquired before the commencement of the

But this is merely a slight rephrasing of the core question, which is whether this Court's decision in *Local Loan* is still the law. If Schlichtmann's earnings through his post-petition efforts can be called the "proceeds" of the pre-petition contingency-fee contract, then logically any worker's earnings can likewise be called the "proceeds" of his or her pre-petition employment contract. In each case, the pre-petition contract has created the arrangement or relationship under which the services are rendered, and has set the terms of the debtor's compensation for that work; if a lawyer's fee for post-petition work is the "proceeds" of his or her retainer agreement, so a pipefitter's wages for post-petition work are, in exactly the same sense, the "proceeds" of his or her employment contract. This would mean that, if the Court of Appeals was correct in this case about the interpretation of section 552, then *Local Loan* has been overruled—for, again, the very holding of *Local Loan* was that a lien could *not* reach the post-bankruptcy earnings of a debtor, even if the debtor had (before bankruptcy) explicitly pledged his future earnings to the creditor as security for a loan. This is why, until now, the authorities have been in accord that section 552 was *not* meant to overrule *Local Loan*'s protection of future earnings from the reach of pre-petition secured creditors, and

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case." (emphasis supplied). Thus, to hold that Cadle is entitled to the post-petition earnings under section 552(b)(1) requires, in this case, the belief that the pre-petition contingency fee contract was property of Schlichtmann (the debtor) and not of the firm. Whether this belief is correct is a somewhat complex matter of state law, on which Schlichtmann believes that the Court of Appeals erred. However, because this Court does not sit to review state law matters, Schlichtmann is not independently seeking review of this sub-issue; for analytical simplicity, the questions presented in this case can be viewed as though Schlichtmann held the contingency-fee agreement both before, and after, his bankruptcy. If the Court is not willing to presume that the Court of Appeals was correct in conflating Schlichtmann and the firm, then the just course would be to vacate the decision below on the grounds that it ignored the "property of the debtor" language in section 552(b)(1).

that such post-bankruptcy earnings cannot be reached by the secured creditor on the theory that they are "proceeds" of a pre-petition contract. *See, e.g., In re Rumker*, 184 B.R. 621, 627-29 (Bankr. S.D. Ga. 1995) (fees earned by attorney through post-petition work cannot be reached by secured creditor, under *Local Loan* and section 552(b)(1)). Rather than having been overruled or pushed aside by section 552, as implicitly held by the court below, *i.e., Local Loan* remains the touchstone in consideration of the application of pre-petition security interests to after-acquired property. *See, e.g.*, 5 Collier on Bankruptcy (15th ed. 2001) ¶ 552.02[2] (noting that courts have continued to rely on *Local Loan* in distinguishing after-acquired property from proceeds); *Johnson v. Cottonport Bank*, 259 B.R. 125, 128-29 (W.D. La. 2000) (relying on *Local Loan* and its "fresh start" principle in interpreting section 552(b)(1), and recognizing that post-petition income that was earned by post-petition labor could not be reached by the holder of a pre-petition security interest) [8]

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[8] In regard to section 552(b)(1), it must also be noted that the decision below creates additional confusion, as to whether this case even should have been heard in a court other than the Bankruptcy Court that presided over Schlichtmann's bankruptcy. For one thing, section 552(b)(1) specifically allows a Bankruptcy Court to exercise its equitable discretion so as to prevent the secured creditor, in a particular case, from reaching the "proceeds." *See, e.g., United Virginia Bank v. Slab Fork Coal Co.*, 784 F.2d 1188, 1191 (4th Cir. 1986). If this case is governed by section 552(b)(1), as the Court of Appeals said, then the Court of Appeals erred further in purporting to rule in Cadle's favor without there having been such an equitable hearing in Bankruptcy Court. This is further indication of the legal quagmire created by the decision of the Court of Appeals.

3. The Legal And Practical Effects Of The Conflict Among Authorities On These Points Are Tremendous, And Underscore The Importance Of Review By This Court.

As shown above, the decision below creates a conflict among the authorities as to an important matter of federal bankruptcy law. This conflict is, we respectfully submit, one that this Court must not allow to fester. The uncertainty in this area of law, now created by the decision below, will affect not only these litigants. It will affect every lawyer (no matter the nature of his or her practice, whether contingency-fee based or otherwise). It will affect every person or entity that is, or that may become, a debtor or creditor in bankruptcy. And this uncertainty now exists in an area of law where, more than most others, certainty, predictability, and nationwide uniformity are of critical importance.

The impact of the decision below, and of the uncertainty engendered by it, applies to all lawyers, not merely those who work on contingency-fee arrangements but also those who work on retainer agreements and for periodic hourly billings. All such lawyers can now expect that their secured creditors will invoke the decision below as support for those creditors' claims to the lawyers' post-petition earnings, on the theory that such earnings constitute the "proceeds" of the lawyers' pre-petition retainer agreements. Until now, such claims have been rejected. *See, e.g., Rumker*, 184 B.R. at 623-29. But if the decision below is allowed to stand, then this previously-settled law is now unsettled.

With the uncertainty created by the decision below, all such lawyers will now be unsure as to whether they will be able to retain the fees they earn through post-petition work. By virtue of this uncertainty, not only will those lawyers' economic "fresh start" be put in jeopardy; furthermore, those lawyers' clients will be adversely affected as well, as the debtor-lawyers will likely seek to withdraw from ongoing

representation rather than assume the risk that all fees for their post-petition work will belong to their creditors. Indeed, it is far from clear that the clients would even be able to find competent substitute counsel with this cloud of uncertainty, for it seems from the opinion below that the secured creditor might even have a claim to any fees earned by that substitute counsel! In short, the decision below jeopardizes not only a lawyer's fresh start, but a client's ability to pursue her case.

Even more troubling is the impact of the decision below on every individual bankruptcy case, no matter what the occupation of the debtor. As discussed above, there is no principled way to cabin the holding below such that it applies only to contingency-fee lawyers, for there is no material distinction between a pipefitter's future wages, an executive's future salary, and a lawyer's future contingent fee insofar as the "fresh start" principle is concerned; the holding below fundamentally throws the stability of the "fresh start" principle into doubt.

In some areas of law, perhaps, uncertainty and lack of uniformity are creative forces. In other areas of law, uncertainty and lack of national uniformity are tolerable and of no great moment. But here we are dealing with issues of federal law, of the sort where uncertainty and lack of national uniformity are intolerable: intolerable from the perspective of individuals (who now do not know whether their earnings will be their own, and so will be deterred from embarking on a vigorous attempt to rebuild their economic lives after bankruptcy), and intolerable from the perspective of creditors (who, in extending credit, need to know in advance, insofar as possible, the rules of law that will govern their ability to obtain repayment). This Court should take this case under review, in order to resolve the conflict and to restore certainty and uniformity to the field.

CONCLUSION

For the reasons stated herein, Petitioner Jan Schlichtmann respectfully submits that a writ of certiorari should be issued to review the decision of the United States Court of Appeals for the First Circuit in order to protect the continued vitality of the "fresh start" doctrine.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 00-1517

CADLE COMPANY,
Plaintiff, Appellant,

v.

JAN RICHARD SCHLICHTMANN,
Defendant, Appellee.

October 4, 2001, Decided

OPINION

Before: TORRUELLA, *Circuit Judge*, CAMPBELL, *Senior Circuit Judge*, and SCHWARZER,[1] *Senior District Judge*.

SCHWARZER, *Senior District Judge*.

This appeal presents the questions of whether a security interest in the accounts receivable of a law firm—including an account arising from a contingent fee agreement—survives the firm's dissolution and the bankruptcy of one of its partners and, if it does, whether it attaches to a post-bankruptcy payment of the fee. We hold that it does and reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

From 1990 to early 1991, the law firm of Schlichtmann, Conway, Crowley and Hugo (the firm) represented plaintiffs in certain environmental litigation in the Middlesex Superior

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[1] Of the Northern District of California, sitting by designation.

Court, Coble v. FL Aerospace Corp., Civil No. 89-76530, (the Groton matter). Among the firm's accounts receivable was a contingency fee agreement, the fee to be paid to the firm at the conclusion of the litigation. The firm had borrowed funds from the Boston Trade Bank (the Bank) and to secure those loans, the firm and its partners had signed a series of notes, guaranties, security agreements and UCC filings. By virtue of these documents, the Bank held a security interest in the Groton fee receivable. Before any part of this fee became payable, the Bank failed and the FDIC sold its assets—including the firm's notes and the security agreements—to Cadle Company (Cadle).

In December 1990, Jan Schlichtmann wrote to the Bank on behalf of the firm, reporting on the status of the outstanding loan accounts and on the progress of the Groton settlement. In the letter, Schlichtmann stated that "This letter serves as an additional security interest of the bank in all Groton fees received by this office."

In June 1991, the Superior Court approved the Groton settlement agreement, under which $825,000 was deposited into an escrow account, with distribution subject to the settlement's approval by the Massachusetts Department of Environmental Protection. In October 1991, Schlichtmann filed for bankruptcy under Chapter 7 of the Bankruptcy Code, causing the firm's dissolution pursuant to Massachusetts General Laws ch. 108A § 31 (1922) ("Causes of Dissolution"). In January 1992, the Bankruptcy Court issued a "Discharge of Debtor" order, releasing Schlichtmann from all his dischargeable debts.

Following Schlichtmann's bankruptcy and the firm's dissolution in 1991, Schlichtmann continued to work on the Groton matter until its final resolution in May 1995. In June 1995, $300,000 from the Groton settlement was deposited into Schlichtmann's escrow account. Of this amount, he distributed $100,000 to his former partners and $200,000 to

himself ($110,000 of which he shared with Thomas Kiley, a former co-defendant who was dismissed from this case). Cadle received no part of the Groton fee settlement.

Cadle then filed this action against Schlichtmann, his former partners, and Kiley in June 1995. After considerable skirmishing, Schlichtmann/Kiley and Cadle filed cross-motions for summary judgment. On July 14, 1999, the district court denied both motions. The court concluded that because Schlichtmann's post-bankruptcy work on the Groton matter was not performed on behalf of the dissolved partnership, he was entitled to a portion of the Groton fee to compensate for the work he performed in his individual capacity. Whether the two-thirds portion of the Groton fee retained by Schlichtmann was a proper division between Schlichtmann and his former partners was to be resolved at trial.

The case went to trial in November 1999.[2] Cadle advanced two theories: First, that Schlichtmann's retaining $200,000 of the Groton fee and distributing $100,000 to his former partners constituted conversion of funds in which Cadle had a security interest; and, second, that Cadle was entitled to the entire Groton fee, having forborne enforcing the notes it held in reliance on Schlichtmann's promise to deliver the fee when received. Cadle's request for a jury instruction on promissory estoppel was denied. The jury returned a verdict for defendant.

Cadle appeals on two grounds: First, that because it held a security interest in the entire Groton fee, the court should have granted its motion for summary judgment; and, second, that the court erred in refusing to instruct the jury on promissory estoppel. Because we conclude that Cadle was entitled to the portion of the Groton fee retained by Schlichtmann, we do not reach the promissory estoppel issue.

The district court had jurisdiction under 28 U.S.C. § 1332, and this court has jurisdiction under 28 U.S.C. § 1291.

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[2] Defendants other than Schlichtmann were dismissed before trial.

DISCUSSION

In its order denying Cadle's motion for summary judgment, the court acknowledged that the motion "hinges on its contention that the former law partnership . . . had a right to the entire $ 300,000 legal fee derived from the second Groton escrow account." *The Cadle Co. v. Schlichtmann, Conway, Crowley & Hugo*, 1999 U.S. Dist. LEXIS 22768, at *2, 1999 WL 527715, at *1 (D. Mass. 1999). The court then reasoned that "the only way it could potentially lay claim to this amount is if all compensable legal work required to gain access to the second escrow account had been completed at the time of the law firm's dissolution in October 1991." *Id.* The court observed that the settlement agreement required additional work by plaintiffs' lawyers post-bankruptcy, Schlichtmann performed that work, and he performed it in his individual capacity, rather than on behalf of the firm. He was, therefore, entitled to compensation. *See id.* The court concluded that "Cadle's security interest only extends to that portion of the Groton fee, if any, that belongs to the dissolved partnership." *Id.*

The fundamental error in this analysis is that it ignores the source of Schlichtmann's entitlement to the Groton fee. The fee to which Schlichtmann laid claim came out of the distribution from the Groton settlement and became payable by reason—and only by reason—of the fee agreement between the (now dissolved) firm and the Groton plaintiffs. The Distribution of Settlement Proceeds form clearly shows an allocation of 32.24% attorneys' fees (plus 4.02% for litigation consultation). It is unquestioned that this amount became payable by reason of the fee agreement between the firm and the plaintiffs. Thus, when Schlichtmann began to work for the plaintiffs after the dissolution, he simply took over the firm's work and carried out what the firm had agreed to do, for which it was to be compensated.

That the firm no longer existed is immaterial to Cadle's claim. It had a security interest in the entire Groton fee; as Schlichtmann wrote in December 1990, "I want to assure you of the bank's security in these anticipated fees in the Groton case."[3] And that Schlichtmann may have taken over the Groton engagement and completed the work cannot operate to wipe out Cadle's acknowledged security interest in the fee from that work without the secured party's written consent; indeed, the security agreement specifically bars disposal of any collateral without the secured party's prior written consent.

Schlichtmann concedes that Cadle holds a security interest in the firm's accounts receivable which encompasses any Groton fee received by the firm. However, he contends that after the firm dissolved, the firm terminated its representation of the Groton clients, and thus left Cadle with a security interest in only the fees related to the work the firm performed on the matter prior to its dissolution. Agreeing with the district court, Schlichtmann characterizes his post-dissolution efforts on the Groton case as work performed in his individual capacity, not on behalf of the firm.

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[3] In this letter, Schlichtmann represented to the Bank that $800,000 was then being held in escrow by the Bank to secure the first part of the settlement, out of which $200,000 in fees would be paid to the firm, and that release of the funds was awaiting settlement of the co-defendant's share representing an additional $825,000, out of which the firm expected a second payment of $206,000. Schlichtmann went on to state:

> I want to assure you of the Bank's security in these anticipated fees in the Groton case. First, you should know that the case has been reported to the court by the parties as being settled. The court has ordered the parties to appear before it as soon as practical in January so that it may approve of the distribution of the funds. Out of the first payment we will pay off the $45,000 note. This letter serves as an additional security interest of the bank in all Groton fees received by this office. We also anticipate making arrangements with the bank for an appropriate schedule to pay down the credit line.

The letter makes clear that the parties intended an assignment of a security interest in sums in escrow, not in future fees.

However, that the post-dissolution work on the Groton matter was performed by Schlichtmann does not alter Cadle's rights as a secured creditor. Partners cannot eliminate a security interest in the partnership's anticipated fees by transferring (without the creditor's written consent) the client files, whether by dissolution of the partnership or otherwise. In *PNC Bank, Delaware v. Berg*, 1997 Del. Super. LEXIS 19, 1997 WL 527978 (Del. Super. Ct. 1997), the court held that a bank could assert its security interest under Article 9 of the Uniform Commercial Code in contingent fee agreements that had been transferred before having matured. There, Tighe, Cottrell, and Logan—partners in a firm called Berg, Tighe, Cottrell & Logan—withdrew from the firm and opened a new firm called Tighe, Cottrell & Logan ("Tighe"). The partners in the new firm took with them many client files, including the active files on which Tighe, Cottrell, and Logan had themselves been working. *See id.* at 2. PNC Bank claimed a continuing security interest in the contingent fee files. In its defense, Tighe argued that the security interest was lost as a result of the agreement between Berg and Tighe in which Berg surrendered any interest in the client files in return for Tighe's relinquishing its interest in the Berg firm. *See id.* at 10. The court rejected the argument, holding that unless PNC Bank authorized this transfer, it retained the right under Uniform Commercial Code § 9-306 to follow the collateral, the contingent fee files. *See id.* The court went on to reject the argument that Tighe had invested eighteen months of effort and additional expense on the assumption that the total of any contingent fee recoveries would be theirs, concluding that this "has absolutely nothing to offer on the issue of whether PNC Bank has a security interest." *Id.* at 11. In denying Tighe's motion for reargument, the court said that accepting Tighe's contention

> would emasculate the protection which § 9-306(2) affords secured creditors. Any debtor would be able to destroy an existing Article Nine security interest simply

> by transferring both the right to payment and the performance due under the contract to an assignee. Section 9-104(f) simply does not countenance wiping out already-existing security interests.

PNC Bank, Del. v. Berg, 1997 Del. Super. LEXIS 19, at *6, 1997 WL 817869 *2 n.1 (Del. Super. Ct. 1997).

The instant case is analogous. The firm dissolved and Schlichtmann agreed with his former partners to take over the Groton matter in exchange for one-third of any recovered attorney's fee. Schlichtmann's departure from the firm and his assumption of responsibility for the Groton matter does not wipe out Cadle's right to follow the collateral—the fee in the Groton case. We agree with the court in PNC Bank, Delaware that to hold otherwise would allow "any debtor . . . to destroy an existing Article Nine security interest simply by transferring both the right to payment and the performance due under the contract to an assignee." *PNC Bank*, Del., 1997 WL 817869 at *2 n.1. Thus, Schlichtmann's claim to have performed work on the Groton matter in his individual capacity after the firm dissolved cannot defeat Cadle's rights as a creditor with a security interest in the Groton fee.

Schlichtmann would distinguish PNC Bank, Delaware because it did not deal with the impact of bankruptcy on the entitlement of a discharged debtor to his post-bankruptcy earnings. Such a discharge extinguishes only in personam claims and generally has no effect on *in rem* claims against property. See *Doral Mortgage Corp. v. Echevarria*, 212 B.R. 185 (B.A.P. 1st Cir. 1997). The June 7, 1991, settlement agreement established the distribution of the settlement proceeds in the Groton matter and determined the amount of the fee due to the firm under the contingency agreement. This took place before Schlichtmann filed for bankruptcy. Cadle's security interest attached to this amount and it has an in rem claim to it. While Schlichtmann's post-bankruptcy work on the Groton matter no doubt contributed to the

consummation of the settlement, the amount of the fee owed to the firm and therefore to Cadle was established outside of Schlichtmann's bankruptcy. Cadle's security interest in this property was not affected by Schlichtmann's bankruptcy.

Schlichtmann attempts to characterize his claim to the fee as post-petition earnings, personal property acquired after his debts were discharged. This argument is foreclosed by § 552 of the Bankruptcy Code, which concerns the effect of pre-petition security interests on post-petition earnings. *See* 11 U.S.C. § 552. "Its purpose is to prevent a creditor's pre-petition security interest in 'after-acquired property' . . . from attaching to property acquired by the estate or debtor-in-possession after the filing of a bankruptcy petition.'" *See N.H. Bus. Dev. Corp. v. Cross Baking Co.*, 818 F.2d 1027, 1029 (1st Cir. 1987). Under 11 U.S.C. § 552(a), "Property acquired . . . by the debtor after the commencement of the case is not subject to any lien resulting from a security agreement entered into by the debtor before the commencement of the case." Section 552(b)(1), however, carves out an exception to this rule:

> If the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, product, offspring, or profits of such property, then such security interest extends to such proceeds, product, offspring, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable nonbankruptcy law, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.

11 U.S.C. § 552(b)(1) (emphasis added).

Section 552(b)(1) applies because Cadle's security interest in the firm's accounts receivable extends to proceeds from

the Groton matter including the contingency fee at issue. Schlichtmann's December 27, 1990, letter to Boston Trade Bank compels that conclusion: "I want to assure you of the bank's security in these anticipated fees in the Groton case. . . . This letter serves as an additional security interest of the bank in all Groton fees received by this office." Because the security agreement covered the firm's accounts receivable—property acquired before the bankruptcy proceedings—and the resulting security interest attached to the proceeds known as the Groton fee, this security interest attached to the Groton fee received by Schlichtmann post-bankruptcy.[4]

An analogous situation was before the court in *United Virginia Bank v. Slab Fork Coal Co.*, 784 F.2d 1188 (4th Cir. 1986). Slab Fork, a coal company, entered into a contract with Armco, Inc. to sell Armco coal it had mined. *See United Va. Bank*, 784 F.2d at 1189. Before Slab Fork filed for bankruptcy, United Virginia Bank acquired a security interest in Slab Fork's contract and its proceeds. *See id.* After Slab Fork shut down its mining operation and declared bankruptcy, it made arrangements for another company to mine and supply coal to Armco. *See id.* Armco continued to pay Slab Fork for the coal. *See id.* Slab Fork argued that the cash it generated after it filed for bankruptcy was not covered by the bank's security interest. *See id.* The court disagreed, holding that under 11 U.S.C. § 552(b), cash proceeds generated under a pre-petition contract received post-petition are subject to a pre-petition security interest in the contract and its proceeds. *See id.* "It is true," the court observed, "that coal had to be supplied to Armco by or for Slab Fork before any right to payment arose, but that is true for all the

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[4] Under both Uniform Commercial Code § 9-306(1) and Massachusetts General Laws ch. 106 § 9-306(1): "'proceeds' includes whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds." See *In re Mintz*, 192 B.R. 313, 318-19 (Bankr. D. Mass. 1996).

payments under the contract, whether generated pre-petition or post-petition." *Id.* at 1190. The court concluded that "No change in the right to payment under the Armco contract was brought about by the filing of a bankruptcy petition, where the underlying asset and all proceeds therefrom were subject to a valid pre-petition security interest." *Id.*

Similarly, Cadle held a security interest in the firm's contingency fee agreement relating to the Groton matter and the proceeds from that agreement. That Schlichtmann performed much of the work after the firm's dissolution and his bankruptcy and before the right to payment arose does not alter the fact that Cadle held a security interest in that payment. We reject Schlichtmann's argument that the post-petition Groton fees were after-acquired personal property, free of Cadle's security interest.

The court recognizes that ordinarily post-petition earnings belong to the petitioner who has sought bankruptcy protection and not to the estate. See 11 U.S.C. § 541(a)(6). However, in this instance, the firm, through Schlichtmann, gave the bank an unqualified security interest in a specific fund (*i.e.*, the attorneys' fee share of the settlement), half of which had already been paid into an escrow account and the other half of which was paid into such an account well before Schlichtmann declared bankruptcy. Nothing in the commitment by Schlichtmann suggested, so far as the bank was concerned, that the fees or the security interest were contingent on the performance of substantial further legal services from the firm or from Schlichtmann. There is no reason why Schlichtmann should be able to back away from his own commitment.

Because we find that Cadle had a security interest in the entire Groton fee, we hold that it was entitled to judgment as a matter of law. We need not, therefore, reach the promissory estoppel issue.

It appears, however, that Cadle did not give notice of its claim to the fee distribution until after Schlichtmann had received the $300,000 and paid $100,000 to the other members of the former firm and (perhaps) shared a portion of it with Kiley. Thus, Schlichtmann is not liable for conversion of the $100,000 he distributed to the firm or of the amount he gave to Kiley before receiving notice from Cadle. Under Massachusetts law, the tort of conversion requires the plaintiff to prove that the defendant intentionally or wrongfully exercised control, ownership or dominion over personal property to which he had no right of possession at the time of the alleged conversion. *See Abington Nat'l Bank v. Ashwood Homes, Inc.*, 19 Mass. App. Ct. 503, 507, 475 N.E.2d 1230 (1985). Cadle makes no claim that it made a specific demand on Schlichtmann for the $100,000 portion of the fee before Schlichtmann sent it to his former partners or for the amount he gave to Kiley, or that Schlichtmann otherwise wrongfully exercised control, ownership or dominion over those amounts, or prevented Cadle from recovering them. Because Cadle's claim is based on a conversion theory, the evidence falls short of permitting recovery of these amounts from Schlichtmann; we express no opinion, however, with respect to any potential liability of the former partners or Kiley. Cadle is therefore entitled to judgment against Schlichtmann in the amount he retained after the payments to his former partners and Kiley before having received notice of Cadle's claim. Because the present record does not enable us to determine this amount, we remand to the district court to make that determination and to enter judgment for Cadle in the appropriate amount.

CONCLUSION

The judgment is reversed and the matter is remanded to the district court for further proceedings consistent with this opinion.

SO ORDERED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 95-11409-GAO

THE CADLE COMPANY,

Plaintiff,

v.

SCHLICHTMANN, CONWAY, CROWLEY & HUGO; JAN R. SCHLICHTMANN; KEVIN P. CONWAY; WILLIAM J. CROWLEY; MICHAEL HUGO; FANEUIL HALL MARKETPLACE, INC.; CONWAY, CROWLEY & HUGO, P.C.; and THOMAS M. KILEY, ESQ., P.C.,

Defendants.

July 14, 1999, Decided

OPINON

MEMORANDUM AND ORDER

Judges: George A. O'Toole Jr., *District Judge*

O'TOOLE, D.J.

After four years of litigation, only two of plaintiff The Cadle Company's ("Cadle") claims remain active: an action for conversion brought against defendant Jan Schlichtmann in his individual capacity, and an action to reach and apply sums paid by Schlichtmann to defendant Thomas M. Kiley, Esq. P.C. ("Kiley"). Having stipulated as to a discrete set of facts, both Cadle and the defendants have moved for summary judgment. For the reasons set forth below, both motions are denied.

Cadle's motion hinges on its contention that the former law partnership of Schlichtmann, Conway, Crowley & Hugo had a right to the entire $ 300,000 legal fee derived from the second Groton escrow account. The only way it could potentially lay claim to this amount is if all compensable legal work required to gain access to the second escrow account had been completed at the time of the law firm's dissolution in October 1991.[1]

The 1991 settlement agreement was altogether clear that the second escrow account would be disbursed to the plaintiffs in the Groton case only upon the occurrence of certain subsequent events. It was envisioned that the plaintiffs' lawyers would perform legal services necessary to promote the satisfaction of those conditions.[2] It appears from

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[1] As a matter of law, Schlichtmann's bankruptcy caused the partnership to dissolve. See Mass. Gen. Laws ch. 108A, § 31(d)(5).

[2] The conclusion that disbursement of the escrow was contingent upon the occurrence of certain events, some of which required the performance of legal services, is manifest from the face of the June 1991 settlement agreement. The agreement provided in part:

> the parties to this Agreement have determined that a plan consisting solely of on-site remediation of the [Groton property], as opposed to a plan which would also include costly off-site remediation, will be fully effective, will fully comply with Massachusetts law, and is therefore appropriate. However, [the Department of Environmental Protection], now in the process of evaluating data, will make the final determination as to the appropriate remediation. Given this uncertainty, the parties to this Agreement agree to work together in partnership to actively promote and achieve DEP acceptance of an on-site remediation program which is cost-effective, which will effectively reduce solvent contamination to levels acceptable to the DEP, and which will fully comply with Massachusetts law. Am. Stipulation Ex. H at 8-9.
>
> If the Department of Environmental Protection ("DEP") determined that the strictly on-site Remedial Response Implementation Plan proposed by one of the Groton defendants was "the sole appropriate and necessary remedy" for the Groton property

the parties' stipulation that Schlichtmann was the lawyer who provided those subsequent legal services. Notwithstanding his affiliation with the partnership prior to his bankruptcy, the legal work Schlichtmann furnished post-bankruptcy could not, as a matter of law, have been provided on behalf of the dissolved partnership. He acted in his individual capacity, and in that capacity earned some entitlement to reimbursement for the services he rendered.[3] Cadle's security interest only extends to that portion of the second Groton fee, if any, that belongs to the dissolved partnership. That would be the amount which the partnership effectively earned before the dissolution. Cadle's security interest does not cover that share of the second fee earned by an entity or individual other than the partnership.

Unresolved issues beyond the universe of stipulated facts prevent a decision in favor of either side. The parties have not stipulated that the division of the $ 300,000 fee that was made—$ 100,000 to the former partnership, $ 200,000 to Schlichtmann[4]—was proper. If that division properly reflected the relative contributions by the firm before dissolution and by Schlichtmann afterwards in securing the disbursement of the second escrow fund, then Cadle's claim

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and that no off-site remediation was required, then the plaintiffs were to gain access to the second escrow account, and their attorneys would be paid a stipulated fee, subject to court approval of the settlement. Am. Stipulation Ex. H at 9-10. On the other hand, if the plaintiffs "substantially and wilfully failed to comply" with a specific paragraph of the agreement or in other respects hindered a Groton defendant's compliance with another agreement provision, then the second escrow account was to revert to that defendant. *Id.* at 11.

[3] The parties have stipulated that "Schlichtmann expended a significant amount of time and effort in the Groton Matter" from October 1991 to June 1995. Am. Stipulation P 6.

[4] Of the $ 200,000 received by Schlichtmann, $110,000 of it "was shared" with Kiley. Am. Stipulation P 9.

to the $ 200,000 received by Schlichtmann will fail. On the other hand, if more should have been allocated for the firm's work prior to its dissolution, then Cadle would have a basis for its claim that Schlichtmann improperly converted that amount. Since the parties dispute the propriety of the division of the $ 300,000 fee, summary judgment is not possible for either movant, and both motions are DENIED.

It is SO ORDERED.

July 14, 1999
DATE

George A. O'Toole Jr.
DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

[Filed Nov. 21, 2001]

No. 00-1517

THE CADLE COMPANY,
Plaintiff, Appellant,

v.

JAN RICHARD SCHLICHTMANN, *et al.*,
Defendants, Appellees.

Before

Boudin, *Chief Judge*, Campbell, *Senior Circuit Judge*, Torruella, Selya, Lynch,* Lipez, *Circuit Judges*, and Schwarzer,** *Senior District Judge.*

Entered: November 21, 2001

William Galvin's motion for leave to file an *amicus brief* in support of the petition for rehearing and Cadle company's motion to late file an opposition to the petition for rehearing are allowed.

Further, the panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for rehearing en banc having been carefully

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* Judge Lynch is recused.

** Of the Northern District of California, sitting by designation.

considered by the judges of the Court in regular, active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court En Banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc, be denied.

By the Court,
Janice O'Neil, Acting Clerk

/s/ Julie Gregg
JULIE GREGG, Appeals Attorney